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Exclusion of Subsequent Remedial Measures and Choice of Law Problems in Strict Liability Actions for Defective Design

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NOTES

EXCLUSION OF SUBSEQUENT REMEDIAL MEASURES AND CHOICE OF LAW PROBLEMS IN STRICT LIABILITY ACTIONS FOR DEFECTIVE DESIGN

Flaminio v. Honda Motor Co.[1]

The admissibility of evidence of subsequent remedial measures to show design defect in a strict products liability action has been widely contested, and state and federal courts sometimes have used conflicting approaches. In this type of case, state law makes liability strict rather than fault-based. In general, federal law governs the admissibility of evidence when litigating in a federal forum. Federal Rule of Evidence 407[2] expressly excludes evidence of subsequent repairs only if offered to prove negligence or culpable conduct. As a result, some federal courts have admitted evidence of subsequent remedial measures if offered to prove design defect, reasoning that the rule is inapplicable by its terms. However, the harshness of strict tort liability has led other courts to exclude the evidence when offered to prove design defect. These courts have treated "design defect" as if it were "negligence or culpable conduct," making the rule applicable by its terms.

The differing policy choices have led to conflicts between Federal Rule of Evidence 407 and state rules. The choice of law analysis required in these instances confuses many courts and lawyers, and the courts of appeal that have addressed the issue are not in accord as to which law controls. In order to

1. 733 F.2d 463 (7th Cir. 1984).
2. FED. R. EVID. 407 provides:

When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

understand the choice of law difficulties with this rule of evidence, the origins and rationale behind the exclusionary rule will be discussed first in the context of *Flaminio v. Honda Motor Co.* In *Flaminio*, the court interpreted Federal Rule of Evidence 407 as applying where the evidence was offered to prove design defect, and decided that the federal rule as interpreted was controlling in federal court over the state rule to the contrary.

Flaminio was driving his Honda motorcycle three days after taking delivery when the front end of the motorcycle began to vibrate.[3] After he attempted an awkward maneuver to ascertain the cause of the vibration, the motorcycle began wobbling uncontrollably, and then shot off the road.[4] The accident left Flaminio a paraplegic. At trial, Flaminio alleged that the wobble was due to defective design,[5] and proffered blueprints showing Honda's subsequent changes in design which allegedly corrected the defect.[6]

The plaintiff contended that Federal Rule of Evidence 407 was not applicable where evidence was introduced to prove design defect, but the trial judge excluded the evidence. Although both negligence and strict liability theories were submitted to the jury, negligence was the only theory on which a verdict was returned.[7] On appeal, the Court of Appeals for the Seventh Circuit held that Federal Rule 407 was applicable and concluded the evidence would only be admissible for some purpose other than to show negligence, culpable conduct, or design defect.[8]

The court reasoned that the evidence could not be admitted to show feasibility under Federal Rule 407 because feasibility was not controverted.[9] Likewise, the evidence could not be used for impeachment purposes because "the exception would swallow the rule."[10] Therefore, the court concluded that the

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3. 733 F.2d at 465.
4. *Id.*
5. *Id.*
6. *Id.* at 468.
7. *Id.* at 465. The jury found the distributor negligent, and 30% responsible for injuries, and assigned 70% of the responsibility for the accident to the plaintiff for his negligence. The Wisconsin comparative negligence statute completely barred recovery because the plaintiff's proportion of fault was greater than the defendant's proportion of responsibility due to strict liability. *Id.*
8. *Id.* at 468.
9. 733 F.2d at 468 (if feasibility of precautionary measures not denied by defendants, then not controverted). *But see* Herndon v. Seven Bar Flying Serv., 716 F.2d 1322, 1329 (10th Cir. 1983) (unless feasibility of precautionary measures is stipulated by defendants, then deemed controverted); 23 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5288 at 144 (1980).
10. 733 F.2d at 468. *See* 23 C. WRIGHT & K. GRAHAM, *supra* note 9, § 5289 at 148:

> Subsequent remedial measures can be admitted as a prior inconsistent statement of a witness, as specific contradiction of a fact to which he has testified, to show his bias toward a party, to demonstrate his lack of expertise, or to show his capacity to perceive, recollect, or communicate his perception of relevant facts.

purposes for which Flaminio sought admission of the evidence were within the ambit of Rule 407.[11]

The Seventh Circuit then considered whether the Wisconsin state rule admitting evidence of subsequent remedial measures should prevail over the federal court's interpretation of Rule 407. Although the evidence would have been admissible under the state rule,[12] the Seventh Circuit considered themselves "in respectful disagreement with the analysis" employed by the Wisconsin courts interpreting that rule.[13] The Seventh Circuit concluded that a federal court whose jurisdiction is based on diversity of citizenship is not required to apply a state law admitting such evidence.[14]

Federal Rule of Evidence 407, like its state equivalents, essentially codified the common law.[15] American courts adopted the English common law view by holding that evidence of subsequent precautionary measures was not admissible to show that an alleged tortfeasor's conduct had been negligent.[16] Ownership, control, feasibility, and impeachment developed as purposes for admission that were not covered by the rule.[17]

The Federal Rules of Evidence were promulgated by the Supreme Court in 1973, but due to objections and proposed amendments, they were not adopted until 1975.[18] There were apparently futile efforts made to amend Rule 407 specifically to include strict liability actions, but the rule was enacted in its original form.[19] Meanwhile, the applicability of state provisions similar to Rule 407 as finally enacted was being tested by litigants in strict liability

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Although is is not clear from the *Flaminio* opinion what the specific grounds were for using the evidence to impeach, the court said that permitting impeachment in this instance was too broad an application. 733 F.2d at 470.

11. 733 F.2d at 468-69.

12. *See* D.L. *ex rel.* Friederichs v. Huebner, 110 Wis. 2d 581, 595, 329 N.W.2d 890, 903 (Wis. 1983); Chart v. General Motors Corp., 80 Wis. 2d 91, 102, 258 N.W.2d 680, 684 (Wis. 1977). Wisconsin Statutes Rule 904.07 provides:

> When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This section does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment or proving a violation of § 101.11.

13. 733 F.2d at 470.

14. *Id.* at 472.

15. *See* FED. R. EVID. 407 advisory committee note.

16. *See generally* 23 C. WRIGHT & K. GRAHAM, *supra* note 9, § 5281 at 86 and § 5282 at 89.

17. *See* 23 C. WRIGHT & K. GRAHAM, *supra* note 9, § 5282 at 90.

18. This two-year gap, among other things, allowed Congress to change some of the rules relating to privilege and competency of witnesses so that state law would govern in these instances. *See* Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693, 693-94, nn.2-6 (1974).

19. *See infra* note 18 and accompanying test. *See generally* 23 C. WRIGHT & K. GRAHAM, *supra* note 9, § 5285 at 123 n.26.

causes of action. This debate continues.[20]

Two primary rationales are cited for excluding evidence of subsequent remedial measures. Originally, the evidence was excluded in negligence actions because "such repairs were completely irrelevant to the issue of defendant's negligence at the time of the accident."[21] This rationale for exclusion in a negligence cause of action was relied upon less as the meaning of "relevance" became more refined. Although the purported ground for exclusion was irrelevance, it was really the possibility of improper inferences by the jury that ensured the survival of the exclusionary rule.[22]

Although called "irrelevant," the courts had in effect applied the balanc-

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20. For courts permitting the use of subsequent remedial measures in a strict liability action, *see, e.g.*, Good v. A.B. Chance Co., 39 Colo. App. 70, ___, 565 P.2d 217, 224 (1977) (post-accident warning relevant to liability issue because failure to warn where there is a duty to do so may be a constitute a defect in and of itself); Marieri v. Volkswagenwerk A.G., 151 N.J. Super 422, 435, 376 A.2d 1317, 1323 (1977) (recall letters admissible to show that the defect established by expert testimony had its origin while the vehicle was in defendants control); Barry v. Manglass, 55 A.D.2d 1, 10, 389 N.Y.S.2d 870, 876 (N.Y. 1976) (recall letters issued by manufacturer two months after accident which warned owners of possible safety problems properly admitted because probative worth of recall letters outweighed any prejudice); Caprara v. Chrysler Corp., 52 N.Y.2d 114, 124, 417 N.E.2d 545, 550, 436 N.Y.S.2d 251, 256 (1981) (use of due care will not exonerate defendant from liability, therefore logic behind exclusion not applicable to strict liability); Matsko v. Harley-Davidson Motor Co., 325 Pa. Super. 452, 473 A.2d 155, 157-59 (1984) (evidence of subsequent recall notice of a strict liability action admissible because traditional policy reasons behind exclusion no longer valid); Caldwell v. Yamaha Motor Co., 648 P.2d 519, 525 (Wyo. 1982) (exclusionary purposes of WYO. R. EVID. 407 applicable only if negligence or culpability of defendant is in issue, not where action brought under strict products liability principles of RESTATEMENT (SECOND) OF TORTS § 402A).

For courts not permitting use of subsequent remedial measures in a strict liability action, *see, e.g.*, Hallmark v. Allied Prod. Corp. 132 Ariz. 434, 441, 646 P.2d 319, 326 (1982) (policy behind exclusionary rule the same whether theory of recovery is negligence or strict liability); Hartman v. Opelika Mach. and Welding Co., 414 So. 2d 1105, 1110 (Fla. Dist. Ct. App. 1982) (evidence admissible where non-party is the repairer; court did not rule on admissibility where repairer is a party to action); Haysom v. Coleman Lantern Co., 89 Wash. 2d 474, 483, 573 P.2d 785, 790-91 (1978) (although policy justification of rule is minimal in strict liability context, subsequent remedial evidence inadmissible because of the difficulty in weighing the probative value versus the prejudicial impact on a case-by-case basis).

21. Ault v. International Harvester Co., 13 Cal. 3d 113, 119, 528 P.2d 1148, 1151, 117 Cal. Rptr. 812, 815 (1974); *see also* 23 C. WRIGHT & K. GRAHAM, *supra* note 9, § 5282 at 91.

22. *See* 23 C. WRIGHT & K. GRAHAM, *supra* note 9, § 5282 at 92 (evidence of subsequent repairs was originally excluded due to "irrelevance," but the operative concept was really "legal irrelevance" in that the evidence was probative of the proposition of negligence, but the prejudicial impact was greater than the probative worth); *see also* James, *Relevancy, Probability and the Law*, 29 CALIF. L. REV. 689, 690-91 (1941) (evidence is irrelevant for two different reasons: "because it is not probative of the proposition at which it is directed, or because that proposition is not provable in this case"). *See generally*, Wellborn, *The Federal Rules of Evidence and the Application of State Law in the Federal Courts*, 55 TEX. L. REV. 371, 388-97 (1977).

ing test of Federal Rule 403,[23] and determined that admitting such evidence to prove fault was too tenuous an inference to be worth the prejudice.[24] Courts considered it unfair to permit the jury to infer from such evidence that the tortfeasor had knowledge of the risk prior to the occurrence of the event.[25] The subsequent repair could also be seen as an admission of fault by the tortfeasor. This was considered highly prejudicial because the reasons repairs were made were not necessarily related to the event that caused plaintiff's injury.[26]

Today, the primary purpose behind the exclusionary rule is the public policy of not deterring manufacturers from making improvements or repairs after the occurrence of an accident.[27] In order to protect the people who make repairs from attacks on their moral compunction to make the world a safer place, relevant evidence is excluded.[28] This public policy argument has been labeled the "quasi-privilege" rationale for exclusion.[29] These concerns leading to exclusion of the evidence may not be so persuasive, however, in the strict liability context.[30]

The leading case for admitting evidence of subsequent repairs in a strict liability action is *Ault v. International Harvester Co.*[31] The defendant in *Ault*

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23. FED. R. EVID. 403 provides:
Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

24. *See* 23 C. WRIGHT & K. GRAHAM, *supra* note 9, § 5282 at 92; J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW 283 (1979); Wellborn, *supra* note 22, at 393.

25. *See* 23 C. WRIGHT & K. GRAHAM, *supra* note 9, § 5282 at 95-96.

26. *See* FED. R. EVID. 407, advisory committee notes; 23 C. WRIGHT & K. GRAHAM, *supra* note 9, § 5282 at 96.

27. *See supra* note 22. The advisory committee acknowledged the traditional ground of irrelevance, but stated that "the more impressive ground" was the public policy of not discouraging repairs. *See* FED. R. EVID. 407, advisory committee notes. In the comments to the CALIF. EVID. CODE, the drafters stated, "The admission of evidence of subsequent repairs to prove negligence would substantially discourage persons from making repairs after the occurrence of an accident." *See* CALIF. EVID. CODE § 1151, advisory committee notes. *But see* Grenada Steel Indus. v. Alabama Oxygen Co., 695 F.2d 883, 887 (1983) (decision to exclude not based just on speculative ground of policy, but it "rests more firmly on the proposition that evidence of subsequent repair or change has little relevance to whether the product in question was defective at some previous time").

28. *See* 23 C. WRIGHT & K. GRAHAM, *supra* note 9, § 5282 at 93.

29. *Id.*

30. The possibility of undue prejudice is not so compelling if the cause of action is based upon strict liability. The plaintiff in proving that the product is defective and unreasonably dangerous must show that the risk to the user of placing the product on the market exceeds its utility. *See generally* Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825 (1973); Wade, *On Product 'Design Defects' and Their Actionability*, 33 VAND. L. REV. 551 (1980). Since the foreseeability, or consciousness of fault is presumed in a strict liability theory for defective design or manufacturing mistake any inference of culpability will not be prejudicial.

31. 13 Cal. 3d at 113, 528 P.2d at 1148, 117 Cal. Rptr. at 812 (1975).

claimed error in the introduction of evidence showing that after the accident in which plaintiff was injured, the defendant replaced the aluminum used to build the gear box of "Scout" vehicles with malleable iron.[32] This substance, plaintiff claimed, was stronger than aluminum, and would have made the failure of the gear box less likely. The California Supreme Court ruled that section 1151 of the California Evidence Code did not require exclusion of subsequent remedial measures in an action based upon strict liability.[33]

The court first noted that section 1151 excluded evidence of subsequent remedial measures when offered "to prove negligence or culpable conduct."[34] Since the action was based upon strict liability for design defect, the court recognized that culpability was not an element of the cause of action, and that defendant could be held liable without plaintiff proving the breach of some duty of care.[35] The defendant manufacturer claimed that the term "culpable" implied blameworthiness in the moral rather than legal sense, and that therefore the rule should exclude the evidence as it does in a negligence action.[36]

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32. *Id.* at 117, 117 Cal. Rptr. at 814, 528 P.2d at 1150.

33. CAL. EVID. CODE § 1151 (West 1966) provides:

When, after the occurrence of an event, remedial or precautionary measures are taken, which, if taken previously, would have made the event less likely to occur, evidence of such subsequent measures is inadmissible to prove negligence or culpable conduct in connection with the event.

Most states that have codified their rules of evidence follow the substantive provisions of the federal rule. For variations in language, see 23 C. WRIGHT & K. GRAHAM, *supra* note 9, § 5285 at 125 n.34.

34. *See supra* note 33.

35. 13 Cal. 3d at 118, 528 P.2d at 1150, 117 Cal. Rptr. at 814.

36. *Id.* at 118, 528 P.2d at 1150-51, 117 Cal. Rptr. at 814-15. Some courts, like the defendant in *Ault*, have insisted that because it is the defendant who pays the judgment, culpability is an inevitable inference. However, conclusions drawn as a result of the outcome of litigation do not necessarily conform to the elements of proof in a given cause of action. A plaintiff must prove different elements for different types of strict liability theories. In a failure to warn cause of action, foreseeability of harm is a necessary element in proving that the product is unavoidably unsafe without adequate warning. Foreseeability of harm is not an element when manufacturer's mistake or a design defect is alleged. *See supra* note 30. In applying Rule 407 to strict liability actions, some courts will cite case authority where the rule was applied in a failure to warn context to support applying the rule in a defective design context. Hence, where foreseeability is relevant, consciousness of fault is relevant, and the possibilities of prejudice are greater if the evidence is admitted. Where foreseeability is not relevant (defective design and manufacturer's mistakes), the policy behind exclusion loses its force. *Compare* DeLuryea v. Winthrop Laboratories, 697 F.2d 222, 229 (8th Cir. 1983); Cann v. Ford Motor Co., 658 F.2d 54, 60 (2d Cir. 1981); Werner v. Upjohn Co., 628 F.2d 848, 857 (4th Cir. 1980); Krueger v. Tappan Co., 104 Wis. 2d 199, 206, 311 N.W.2d 219, 224 (Ct. App. 1981) (failure to warn cases where subsequent remedial measures was excluded) *with* Grenada Steel Indus. v. Alabama Oxygen Co., 695 F.2d 883, 887 (5th Cir. 1983) (evidence of subsequent remedial measures excluded to show defective design in strict liability action); Robbins v. Farmers Union Grain Terminal Assoc., 552 F.2d 788, 795 (8th Cir. 1977); D.L. *ex rel.* Friederichs v. Huebner, 110 Wis. 2d 581, 610, 329 N.W.2d 890, 905 (1983) (evidence of subsequent remedial measures admitted to show defective design in strict liability action). *See generally*

The court, however, found plaintiff's argument more persuasive.

The privilege rationale for exclusion was rejected by the *Ault* court. First, the court considered it within the economic self-interest of a manufacturer to improve and repair defective products.[37] Second, excluding the evidence was considered contrary to the public policy of encouraging the distributors of mass-produced goods to sell safer products.[38] Furthermore, it was presumed that the legislature must not have intended the rule to apply because the objectionable purposes for admission were confined to "negligence" or "culpable conduct."[39]

In *Flaminio*, the court concluded that Federal Rule of Evidence 407 was applicable even though the terms of the rule did not explicitly exclude the evidence for purposes of design defect or strict liability. The policies behind exclusion of subsequent remedial measures in a negligence action were viewed as being equally applicable in a strict liability action.[40] The *Ault* reasoning was therefore rejected. Although the *Flaminio* court seemed to acknowledge the distinction between strict liability and negligence, it did not find the differences persuasive enough to justify admitting the evidence.[41] Furthermore, the court seemed to believe that the application of the Wisconsin comparative negligence statute made "culpable conduct" relevant to the strict liability action, thereby making the rule applicable by its terms.[42]

RESTATEMENT (SECOND) OF TORTS 402A, comment K (1965).

37. *Id.* at 120, 528 P.2d at 1152, 117 Cal. Rptr. at 816. Culpability in any form usually requires some blameworthy state of mind like negligence, recklessness, or intentional conduct. No blameworthy state of mind is required to hold a defendant liable in a strict liability action. *See supra* note 30 and *infra* note 42.

38. *Id.* at 120, 528 P.2d at 1152, 117 Cal. Rptr. at 816.

39. 13 Cal. 3d at 118-19, 528 P.2d at 1151, 117 Cal. Rptr. at 815. This same argument has been made with regard to Federal Rule 407. *See* 23 C. WRIGHT & K. GRAHAM, *supra* note 9, § 5285 at 124: "The failure of Congress to amend the rule to cover products liability is not without significance."

40. 733 F.2d at 469.

41. *Id.* at 469-70. The concept of strict liability evolved so that the manufacturer could be responsible for injuries, and the product user would be compensated, regardless of whether the manufacturer was at fault. Accordingly, state of mind of the tortfeasor, or foreseeability of risk, does not have to be shown in proving the strict liability action for defective design. *See supra* notes 30 & 36 and accompanying text.

42. 733 F.2d at 769. To the extent that responsibility for injury and blameworthiness are equivalent, as in a negligence action, this approach may be supportable. However, the elements of negligence and culpable conduct to which this evidence would be prejudicial were simply not part of the burden of proof in a strict liability cause of action in Wisconsin. *See* Dippel v. Sciano, 37 Wis. 2d 443, 460-61, 155 N.W.2d 55, 63-64 (1967). It is true that a risk/utility analysis could be used in determining whether a product was unreasonably dangerous, but the foreseeability of any danger does not have to be proven, and this is the crucial distinction. To decide that proving product defect was equivalent to proving negligence was to rewrite the substantive burden of proof in the state cause of action.

However, strict liability for failure to warn and defective design were tried before the jury in *Flaminio*. Because failure to warn, like negligence, requires a showing of foreseeability of risk to impose liability, the prejudice of subsequent repair evidence to

Flaminio nevertheless contended that the Wisconsin state rule admitting evidence of subsequent repairs was controlling in federal court over the Seventh Circuit's interpretation of Federal Rule 407.[43] The court held that the state rule was not controlling.[44] Conflict questions between state and federal law are subject to two lines of reasoning, depending upon the question involved. The *Flaminio* court analyzed the conflict using the method employed by courts when determining conflicts between state and federal rules of procedure. It is not clear, however, that this was the appropriate analysis.

The *Flaminio* court first noted that the Federal Rules of Evidence, unlike the Federal Rules of Civil Procedure, are not expressly subject to the Rules Enabling Act, which gives the Supreme Court the authority to promulgate rules of civil procedure. Rules so promulgated, however, "shall not abridge, enlarge or modify any substantive right."[45] The court noted that federal courts are constitutionally obligated under the *Erie* doctrine to apply state laws to the extent that these are classified as substantive.[46] After discussing the relative merits of whether Federal Rule 407 was substantive or procedural, the court concluded that because one of the reasons for the rule was distrust of the jury's ability to draw correct inferences from evidence of subsequent remedial measures, the rule could be classed as procedural.[47] In support of this position, the court cited language from *Hanna v. Plumer*,[48] declaring that where a federal rule of civil procedure was in direct conflict with a state rule to the contrary, the federal rule would be valid and controlling if it could be rationally

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the defendant may be undue. *See* DeLuryea v. Winthrop Laboratories, 697 F.2d 222, 229 (8th Cir. 1983). The Wisconsin Supreme Court however, in a similar action, decided that the proper remedy for the possible prejudice was a limiting instruction, not exclusion of the evidence. *See* D.L. *ex rel.* Friederichs v. Huebner, 110 Wis. 2d 581, 610, 329 N.W.2d 890, 903 (1983).

43. 733 F.2d at 470.

44. *Id.* at 472. Most federal circuit court opinions dealing with whether Rule 407 is applicable in a strict liability action have engaged in very little discussion of whether state or federal law should govern if in conflict. *See, e.g.*, Josephs v. Harris Corp., 677 F.2d 985 (3rd Cir. 1982); Werner v. Upjohn Co., 628 F.2d 848 (2d Cir. 1980) (no discussion of the issue). *Cf.* Moe v. Avions Marcel Dassault-Breguet Aviation, 727 F.2d 917, 931 (10th Cir. 1984) (dicta indicating that admissibility of evidence in diversity actions not governed exclusively by the Federal Rules of Evidence); Grenada Steel Indus. v. Alabama Oxygen Co., 695 F.2d 883, 885 (5th Cir. 1983) (state substantive law applies, sufficiency of evidence governed by state law, and admissibility of evidence, as a matter of procedure, is governed by federal rules).

45. 733 F.2d at 470. The text of the Rules Enabling Act, 28 U.S.C. § 2072 (1982), in pertinent part provides:

> The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts of the United States in civil actions . . . such rules shall not abridge, enlarge or modify any substantive right, and shall preserve the right of trial by jury.

46. 733 F.2d at 471.

47. *Id.* at 471-72.

48. 380 U.S. 460 (1965).

classified as procedural.[49] The court considered the substantive underpinnings of the evidence rule, but dismissed these since the rule was arguably procedural.[50]

In *Hanna v. Plumer*, plaintiff served defendant executor as provided in the federal rule; defendant contended that service was improper since in-hand service was not made pursuant to the state rule.[51] The Supreme Court held that service of process was proper, and was controlled by Federal Rule of Civil Procedure 4(d)(1) in a diversity action in federal court.[52]

The majority in *Hanna* rejected the argument that *Erie Railroad v. Tompkins*[53] limited the application of the Federal Rules of Civil Procedure.[54] First, the Court found that the facts of this case did not implicate the equal protection and forum shopping problems to which the *Erie* decision was addressed.[55] The application of the federal rule did not so alter "the mode of enforcement of state created rights" as to raise any substantial equal protection claim.[56] Furthermore, the difference between the rules would not be relevant in deciding to choose one forum over another.[57]

Secondly, the Court held that *Erie* and its progeny were not the appropriate test for the validity or applicability of a federal rule of civil procedure.[58] The Court noted that *Erie* had never been used to void a federal rule.[59] Furthermore, because the Federal Rules of Civil Procedure were within Congres-

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49. 733 F.2d at 471 (citing from Hanna v. Plumer, 380 U.S. 460, 472 (1965)). The court conceded that the distrust for the jury must have been a "mild distrust" due to the built-in situations not covered by the rule—i.e., feasibility, ownership, etc. 733 F.2d at 471. *See supra* note 2.

50. 733 F.2d at 472.

51. 380 U.S. 460, 461-62 (1965). The Massachusetts rule in question provided for in-hand service upon an executor, whereas the federal rule only required that service be made at the executor's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. *Id.*

52. *Id.* at 474.

53. 304 U.S. 64 (1938). In *Erie*, the plaintiff claimed that the railroad's duty to a trespasser should be determined in accordance with "general law" principles as laid down in the federal courts. 304 U.S. at 70. The defendant railroad claimed that the Rules of Decision Act required the application of Pennsylvania law. *Id.* The text of the Rules of Decision Act is contained within the Federal Judiciary Act of September 24, 1789, 28 U.S.C. § 725 (1982), and provides in pertinent part:

> The laws of the several states, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States in cases where they apply.

54. 380 U.S. at 466-74.

55. *Id.* at 466-69.

56. *Id.* at 469.

57. *Id.*

58. *Id.* at 469-70. Although the Court found that the facts of *Hanna* did not involve *Erie* problems, it evidently wanted to make clear that *Erie* did not apply anyway.

59. *Id.* at 470.

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sional authority to enact pursuant to the necessary and proper clause, any rule that could be rationally classified as procedural should be held valid.[60] The importance of the federal policy of promoting procedural uniformity within the federal courts was stressed by the Court.[61]

Justice Harlan took issue with this second ground for the *Hanna* decision in his concurring opinion:

> [F]or the Court attributes such overriding force to the Federal Rules that it is hard to think of a case where a conflicting state rule would be allowed to operate, even though the state rule reflected policy considerations which, under Erie would lie within the realm of state legislative authority.[62]

Harlan believed that although the *Erie* policies did not require the application of state law in *Hanna*, they still constituted the relevant inquiry whenever a direct conflict between state and federal rules occurred.[63]

Hence, conflict questions between state and federal law may be subject to one of two different analyses. Under the *Erie* line of cases, the strength of opposing policy considerations underlying the respective state or federal rules is weighed. Possible discrimination as a result of unequal administration of the law, and the likelihood of a litigant choosing one forum over another as a result of the law that may be applied are basic to the inquiry.[64] Under the test

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60. *Id.* at 472. The Court appeared to say that if the rule is constitutionally valid, then it must be applied.

61. *Id.* at 472-73.

62. *Id.* at 478.

63. *Id.*

64. The *Erie* Court was primarily concerned with ending unequal administration of the laws and forum shopping which were occurring under the rule of Swift v. Tyson, 16 Pet. 1 (1842). Federal courts had not been vested with the power, under the Constitution, to declare federal common law. Such interference was considered to be an unconstitutional invasion of the authority and independence of the states. 304 U.S. at 75-79. Furthermore, because of such federal court intrusions, citizens within the same state were subjected to two different sets of laws depending upon whether one of the parties were permitted by the rules of civil procedure to invoke diversity jurisdiction of the federal court. As a result of the varying rules of law, litigants would shop around for the most congenial forum. 304 U.S. at 75-76. The Court concluded that not only did the Rules of Decision Act command the end of the *Swift* doctrine, but the Constitution dictated the result as well. 304 U.S. at 77-78.

In Guaranty Trust Co. v. York, 326 U.S. 99, 112 (1945), the Court decided that the federal court was obligated to apply state law where, if it was disregarded, the outcome of the litigation would be significantly affected.

In Byrd v. Blue Ridge Coop., 356 U.S. 525 (1958), even though the outcome of the litigation was affected, the Supreme Court decided that the federal law providing that the issue be decided by a jury should prevail where the state law provided for the issues to be tried by a judge. 356 U.S. at 537. The Court looked to the state policies behind the law, and found that the law was not an "integral part" of the state substantive policies. 356 U.S. at 536. However, the federal policy of assigning decisions of disputed questions of fact to the jury was supported by the strong federal policies underlying the seventh amendment. 356 U.S. at 539. Uniform enforcement of state created rights was not so compelling an interest in this context. *Byrd* therefore tempered the test of *York* with a "countervailing considerations" analysis. 356 U.S. at 537-40.

developed in *Hanna*, any federal rule that is arguably procedural will be applied regardless of state policies indicating that the state rule should be applied.

The practical difference between the analyses is that under the "arguably procedural" test to which direct conflicts between federal and state rules of civil procedure are subject, the state policies underlying its law, as well as any constitutional problems with forum shopping or unequal administration of laws are effectively ignored.[65] Although Justice Harlan argued in his concurring opinion in *Hanna* that the "arguably procedural" test was too broad, and that the *Erie* policies should control,[66] the majority apparently rejected this approach.[67] This is usually not an aberrational result with regard to the rules of civil procedure, since such rules generally do not involve substantive state policies, or implicate constitutional concerns like those addressed in *Erie*.

The *Flaminio* court applied the *Hanna* analysis automatically, without discussing why *Hanna* was the relevant precedent.[68] The effect of employing the *Hanna* analysis is that the state substantive policies behind admitting the evidence are bypassed entirely.[69] They are simply not relevant to the inquiry. Because Wisconsin's evidence rule was closely tied to the substantive policies of strict liability,[70] there are persuasive reasons for rejecting the *Hanna* analysis in this situation.

In Wisconsin, because of the fortuity of diversity of citizenship, some defendants will be immune from the admission of evidence of subsequent repairs while others will be forced to respond to such evidence.[71] It is not clear that

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65. *See* Hanna v. Plumer, 380 U.S. 460, 471 (1965).

66. *See supra* note 62 and accompanying text.

67. *See supra* note 58 and accompanying text.

68. The *Hanna* analysis was developed in a case very different from that presented in *Flaminio*. *Hanna* involved a Federal Rule of Civil Procedure, not a Rule of Evidence. Because the Rules of Evidence were enacted directly by Congress, they are not expressly subject to the terms of the Rules Enabling Act. It is the Rules Enabling Act that was interpreted in *Hanna*. The Court decided in *Hanna* at the outset that the *Erie* policies were not invoked by application of the federal rule. *See supra* note 55 and accompanying text. In addition, the Court noted that the federal policy of procedural uniformity in the federal courts favored the application of federal rules where a direct conflict with a state rule existed. *See supra* note 61 and accompanying text. In *Flaminio*, it was first of all unclear that the terms of the federal rule were intended to apply when evidence is offered to prove design defect. Secondly, the rule in *Hanna* was strictly a procedural rule, whereas both the federal and state rules in *Flaminio* were grounded in substantive considerations which likened them to "quasi-privilege" rules. Furthermore, because of the *Erie* issues present in *Flaminio* that were not present in *Hanna*, it is not clear that the *Hanna* decision was intended to apply in this type of situation.

69. *See supra* note 65 and accompanying text.

70. *See* D.L. *ex rel.* Friederichs v. Huebner, 110 Wis. 2d 581, 610, 329 N.W.2d 890, 903-04 (Wis. 1983) ("Limiting the plaintiff's proof . . . would limit the plaintiff's ability to prove the strict liability allegation, even though a purpose of adopting the doctrine of strict liability was to aid the plaintiff in proving the case.").

71. Where a plaintiff is a resident of Wisconsin, suing a resident defendant, the

litigants would choose one forum over another as a result of this evidence rule, but it is certainly a strong possibility. To the extent that the rule would cause a litigant to choose one forum over the other, the *Erie* policies would be implicated.[72] In this respect, the rule would be viewed by litigants as outcome determinative.

However, if the strength of the federal policy of encouraging manufacturers to make repairs were balanced with the strength of the state policies underlying strict liability, arguably the federal rule would control.[73] Yet because there is no federal statute articulating any federal policy on affecting the plaintiff's burden of proof in a strict liability cause of action, it is hard to imagine how the federal interest could outweigh that of the state. The Wisconsin rule should be considered an "integral part" of the strict liability scheme within the state.[74] As such, the state rule should prevail.

Without rejecting the *Hanna* analysis with regard to the Federal Rules of Evidence, the *Flaminio* court could still have avoided the *Erie* issues raised by the application of the federal rule by interpreting the rule as being inapplicable in that situation.[75] Although it has been argued that the failure of Congress to amend Rule 407 to make state law controlling in strict liability actions indicates a legislative intent that federal law control,[76] the legislative intent argument cuts both ways. Because Congress failed to amend Rule 407 to specifically include strict liability actions, it may have been intended that the rule not apply.[77] The advisory committee intended merely to restate the conventional doctrine,[78] which applied only to negligence actions. Moreover, since there are real analytic and practical difficulties in equating "culpable conduct" with "strict liability,"[79] perhaps the court should have given the terms of the rule their plain meaning.[80]

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federal court would lack jurisdiction without a federal question. Where the plaintiff is a resident of Wisconsin suing a non-resident defendant for $10,000 or more, the plaintiff may bring suit in state court, but the defendant has the ability to confer jurisdiction on the federal court by removing to federal court and invoking diversity jurisdiction.

A non-resident plaintiff suing a resident defendant may choose either the federal or state forum if the amount in controversy exceeds $10,000. *See* 28 U.S.C. §§ 1331-32 (jurisdiction), 1441 (removal) (1982).

72. *See* Hanna v. Plumer, 380 U.S. 460, 469 (1965).

73. *See* Byrd v. Blue Ridge Coop., 356 U.S. 525, 537-39 (1957).

74. *See* Walker v. Armco Steel, 446 U.S. 740, 751-52 (1980).

75. *See supra* note 64 and accompanying text; *see also* Wellborn, *supra* note 22, at 401 (suggesting that conflict between Federal Rules of Evidence and state rules be resolved with *Hanna* analysis).

76. *See* Rioux v. Daniel Int'l Corp., 582 F. Supp. 620, 624-25 (D. Me. 1984). *See supra* note 39 and accompanying text.

77. *See* 23 C. WRIGHT & K. GRAHAM, *supra* note 9, § 5291 at 157; *see supra* note 19 and accompanying text.

78. *See* FED. R. EVID. 407, advisory committee note.

79. *See* Ault v. International Harvester, 13 Cal. 3d 113, 118, 528 P.2d 1148, 1150-51, 117 Cal. Rptr. 812, 814-15; *see supra* notes 42 & 43 and accompanying text.

80. The *Walker* Court stated that with regard to the Federal Rules of Civil

Furthermore, as a matter of statutory analysis in the conflict of laws context, the *Flaminio* court should have applied the state law. In *Walker v. Armco Steel*,[81] a unanimous Supreme Court upheld the application of an Oklahoma statute which was in conflict with Federal Rule of Civil Procedure 3.[82] The *Walker* Court affirmed the analysis in *Hanna* but distinguished the facts. The petition in *Walker* was filed within the statutory period, but not served within sixty days after the filing date. Under the state law service of the petition within sixty days caused the date of commencement to be the filing date for purposes of tolling the statute of limitations. Service after sixty days from filing caused the date of service to be the commencement date. Under Federal Rule of Civil Procedure 3, the date of filing commenced the action.[83] Defendant claimed that the state statute of limitations barred the claim.[84] The plaintiff claimed that the suit was not barred because under *Hanna* Federal Rule of Civil Procedure 3 was arguably procedural, within the constitutional authority of Congress to enact, and therefore controlling.[85]

The *Walker* Court stated that the first question to ask when a conflict arises is whether the scope of the federal rule is broad enough to cover the issue before the court.[86] This question of interpretation involves more than mere statutory construction of the language contained in the federal rule under scrutiny. The Court held that the federal rule was never intended to "displace state tolling rules for purposes of state statutes of limitations."[87] The Court then discussed the substantive state policies underlying the state rule, and concluded that the sixty day service rule was an "integral part" of the state statute of limitations. There was therefore no direct conflict between the state and federal rules because the state rule dealt with the statute of limitation, while the federal rule fixed the date of commencement. The Court concluded that the *Hanna* analysis did not apply.[88] Instead the polices behind *Erie* were controlling.[89]

Only if the Court had found a direct conflict between the state and federal rules would the two-step analysis of *Hanna* apply. That is, first, is the rule

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Procedure, they "should be given their plain meaning. If a direct collision with state law arises from that plain meaning, then the analysis developed in Hanna v. Plumer applies." 446 U.S. at 750 n.9.

81. 446 U.S. 740 (1980).
82. *Id.* at 742-43.
83. *Id.*
84. *Id.* at 742.
85. *Id.* at 749.
86. *Id.* at 749-50.
87. *Id.* at 750-51.
88. *Id.* at 751-52.
89. *Id.* at 752. *See* Ragan v. Merchants Transfer and Warehouse Co., 337 U.S. 530 (1949). The facts of *Ragan* were virtually indistinguishable from *Walker*. In both cases the suit would have been barred in state court because service of process took place after the statute of limitations had run. In *Ragan*, the state rule was upheld, and the action therefore barred.

arguably procedural, and if so, is it within Congress' constitutional authority to enact?[90] To the extent that the *Hanna* analysis is indeed applicable to the Federal Rules of Evidence, the analysis in *Walker* is both relevant and controlling where applicable.

In *Flaminio*, the language of the conflicting rules was virtually identical.[91] The interpretations of the language, based upon the respective Seventh Circuit and state policies collided. However, the *Flaminio* court[92] did not interpret Rule 407 in the light of the *Walker* Court's mandate that state policies must be considered to determine if a conflict exists in the first place.[93] In considering this issue, the *Walker* Court recognized that the language of the state and federal rules was procedural on it's face, but the substantive state policies behind the statute of limitations were tied in with the rule for commencing an action.[94] As such, the state rule was applied. The *Flaminio* court did not discuss whether Congress intended Federal Rule 407 to interfere with the state substantive policies regarding the imposition of strict liability.[95] Given the *Erie* implications of applying different rules within Wisconsin, the court should have interpreted Rule 407 in the light of the state policies underlying strict liability which were designed to make the plaintiff's burden of proof easier.[96]

Rioux v. Daniel International Corp.[97] presents an interesting case for purposes of comparison. In that case, Federal Rule of Evidence 407 was held to be controlling where the state law permitted evidence of subsequent repairs to show negligence or culpable conduct.[98] This is different from the strict lia-

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90. 446 U.S. at 748.

91. *See supra* notes 2, 12.

92. *See Flaminio*, 733 F.2d at 468-70.

93. 446 U.S. at 749-50.

94. *Id.* at 751-52. Although the state rule governing commencement of the action was procedural on its face, the state statute of limitations scheme was tied in with it. Although the rule of evidence in *Flaminio* may have seemed procedural on its face, the state strict liability scheme was tied in with it. *See supra* note 70 and accompanying text.

95. 733 F.2d at 468-71. The court acknowledged the substantive policy grounds for exclusion, but decided that since the evidence was excluded because juries may over-react to the evidence, the rule was entwined with procedural considerations as well. Following *Hanna*, the court went on to decide that since the rule was clearly within Congress' authority to enact, Rule 407 was controlling. *Id.* at 471. This analysis omitted the *Walker* considerations regarding the likelihood of the federal rule intruding upon the state substantive policies. *See supra* note 87.

96. "[W]hether or not this was the Congressional intent, the commentators have all agreed that the *Erie* rule requires the application of state rules with respect to the use of subsequent remedial measures in cases in which the state substantive law applies." 23 C. WRIGHT & K. GRAHAM *supra* note 9, § 5291 at 157. *See generally* 2 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE 166 (1978); 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE, para. 407[02] at 407-12 (1975).

97. 582 F. Supp. 620 (D. Me. 1984).

98. 582 F. Supp. at 625. ME. R. EVID. § 407(a) provides: "When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is admissible."

bility case where design defect is the object sought to be proved. The district court of Maine applied the *Hanna* analysis to the direct conflict between the state and federal rule, and found the federal rule to be controlling because it was arguably procedural.[99] The court noted that the *Hanna* test was affirmed in *Walker*, and that in this case the plain meaning of the respective rules was directly conflicting.[100] Because Congress had changed some of the evidence rules to incorporate state law in privilege and competency of witnesses, the court concluded that Congress intended that the federal rule apply.[101]

Rioux is different from *Flaminio* in that no interpretation was necessary in *Rioux* to find a conflict.[102] Furthermore, there was no indication in *Rioux* that the Maine rule of evidence, although based upon policy considerations, was closely tied to the substantive considerations underlying the negligence cause of action. The nature of the conflict is so direct that presumption of Congressional intent to preempt state law in federal court in this area seems justifiable.[103] Regardless of Congressional intent, however, defendants in Maine state courts are subjected to the admission of this evidence, while defendants in federal court are not. The significance of this result was not discussed by the court.

It is clear that the Seventh Circuit felt the evidence in *Flaminio* should be excluded, and the court accordingly reached this result. The court interpreted an exclusionary rule of evidence more broadly than the express language as enacted by Congress required, thus imposing the "Seventh Circuit judgment"(to be distinguished from the "Congressional judgment") regarding substantive tort policy upon Wisconsin residents and litigants. Furthermore, after deciding as a matter of statutory construction that the federal rule covered the situation, the court then proceeded to analyze the choice of law issue by brazenly disregarding the existence of the rule promulgated by the Supreme Court in *Walker*. *Walker* teaches that the analysis required to determine whether a federal rule is broad enough to cover the issue under scrutiny in the conflict of law context involves thorough analysis of the state policies which support the state rule. It is not simply a matter of statutory construction of the federal language in the federal rule. This is what *Walker* tells us, and that is why the Seventh Circuit ignored *Walker*. Rational consideration and application of *Walker* would have dictated a result that the Seventh Circuit simply did not want to reach.

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99. 582 F. Supp. at 624. *See supra* note 75 and accompanying text.
100. 582 F. Supp. at 624 n.6.
101. *Id.* at 625.
102. *Id.* at 624 n.6.
103. Evidence offered to prove negligence falls directly within the terms of the federal rule, and is explicitly outside of the state rule. This is unlike the *Flaminio* situation where "design defect" does not fall within the terms of either the state or federal rule.